Pan Global Textile Bhd, Penang v Ang Beng Teik A

HIGH COURT (PENANG) — ORIGINATING MOTION NO 25-15-1993
VINCENT NG J
20 SEPTEMBER 1994

B

Labour Law — *Industrial Court — Jurisdiction — Whether can consider issue not referred by Minister — Whether power to act according to equity and good conscience limited to issues referred — Industrial Relations Act 1967 ss 20(1A), 30(5)*

Labour Law — *Employment — Absence from work — Failure of employee to report for duty on demoted position — Whether employee deemed to have resigned — Whether employee's action was direct response to employer's breach of contract — Whether employer has to conduct inquiry before accepting employee's repudiation of employment contract* C

Words and Phrases — *'Former employment' — Industrial Relations Act 1967 s 20(1)* D

The respondent, the general manager of the applicant company ('the applicant'), was suspended from work and subsequently demoted to the position of general affairs manager following an investigation into his alleged mismanagement of the applicant's affairs. The applicant E informed the respondent of his demoted position and sent him two letters requesting him to report for duty on the demoted position but the respondent failed to do so. By reason of the respondent's failure to report for duty, the applicant issued a letter of termination dated 6 June 1989. The matter was referred to the Industrial Court which found that the applicant had victimized the respondent by F downgrading him and dismissing him without just cause or excuse.

The applicant applied to the High Court for an order of certiorari to quash the Industrial Court's award on the grounds that: (i) the Industrial Court had considered the question of the respondent's constructive dismissal when the issue was not referred to it within the G 60-day period under s 20(1A) of the Industrial Relations Act 1967 ('the Act'); (ii) the Industrial Court had erred by holding that the applicant had dismissed the respondent when it was the respondent who had wrongfully repudiated his contract of employment with the applicant; and (iii) even if the letter of 6 June 1989 constituted dismissal or termination, it was not without just cause or excuse in H view of the respondent's continued refusal to report for duty on the demoted position.

Held, allowing the application for certiorari:

(1) The Industrial Court had considered the issue of constructive I dismissal although the dispute referred to it was dismissal. The reliefs against constructive dismissal and dismissal are entirely distinct and separate reliefs and the respondent did not seek the

relief of constructive dismissal within the 60-day period under s 20(1A) of the Act. As such, it was not open to the Industrial Court to deliberate on the question of constructive dismissal. The award was a nullity and should be quashed.

(2) The Industrial Court is a creature of statute and derives it powers and jurisdiction solely from its founding statute, and its terms of reference exclusively from the reference made to it by the Minister. Though s 30(5) of the Act enjoins the Industrial Court to act according to equity and good conscience without regard to technicalities and legal form, that section must be interpreted to mean that the Industrial Court may deal with matters arising out of matters referred to it so long as it restricts itself only to matters within the ambit of the specific relief claimed.

(3) Though the respondent may have had valid and justifiable grounds to complain about his constructive dismissal, an employee who leaves his work will be held to have resigned. There would be no dismissal within the meaning of the employment legislation unless there was a sufficiently important breach of contract by the employer and the employee's action was in direct and prompt response to the employer's breach to counter the point of waiver of breach or variation of contract of service.

(4) The respondent's act of being absent was itself a misconduct amounting to a repudiation of the contract of employment and he had, by his failure to report to work, dismissed himself. The applicant had acted reasonably in accepting the repudiation and had not dismissed the respondent. Therefore, the question of dismissal without just cause or excuse did not arise.

(5) The applicant's failure to conduct a second inquiry into the respondent's conduct in not reporting for duty on the demoted position was not fatal as his misconduct was clear and the proper forum to raise the issue of his demotion would be to the Director-General pursuant to s 20(1) of the Act.

Obiter:

The words 'former employment' in s 20(1) of the Act mean the employee's former position immediately prior to his dismissal.

[Bahasa Malaysia summary

Responden, iaitu pengurus besar syarikat pemohon ('pemohon itu'), telah digantung kerja dan kemudiannya telah diturunkan pangkat ke jawatan pengurus hal-ehwal am berikutan suatu penyiasatan tentang pengataan bahawa beliau telah menyalah urus hal-ehwal pemohon. Pemohon telah memberitahu responden tentang jawatannya yang telah diturunkan pangkat itu dan menghantar dua pucuk surat kepada beliau untuk meminta beliau supaya melaporkan diri untuk bertugas pada jawatan yang diturunkan pangkat itu tetapi responden gagal

berbuat demikian. Sebagai akibat kegagalan responden untuk melaporkan diri untuk bertugas, pemohon telah mengeluarkan sepucuk surat penamatan kerja yang bertarikh 6 Jun 1989. Perkara itu telah dirujuk kepada Mahkamah Perusahaan yang telah memutuskan bahawa responden telah dijadikan mangsa pemohon dengan penurunan pangkat dan pemecatannya tanpa sebab atau alasan yang adil. A B

Pemohon telah memohon kepada Mahkamah Tinggi untuk suatu perintah certiorari untuk membatalkan award Mahkamah Perusahaan itu atas alasan bahawa: (i) Mahkamah Perusahaan telah mempertimbangkan soalan tentang pemecatan konstruktif responden sedangkan isu itu tidak dirujuk kepadanya dalam masa 60 hari di bawah s 20(1A) Akta Perhubungan Perusahaan 1967 ('Akta itu'); (ii) Mahkamah Perusahaan telah membuat kesilapan apabila memutuskan bahawa pemohon telah memecat responden sedangkan respondenlah yang telah menolak kontrak pekerjaannya dengan pemohon; dan (iii) meskipun surat yang bertarikh 6 Jun 1989 itu merupakan pemecatan atau penamatan, ianya bukan tanpa sebab atau alasan yang adil memandangkan keengganan responden yang berterusan untuk melaporkan diri untuk bertugas pada jawatan yang diturunkan pangkat itu. C D

Diputuskan, membenarkan permohonan untuk certiorari itu: E

(1) Mahkamah Perusahaan telah mempertimbangkan isu pemecatan konstruktif responden walaupun pertikaian yang dirujuk kepadanya itu ialah pemecatan. Relief terhadap pemecatan konstruktif dan pemecatan adalah relief yang betul-betul berlainan dan berasingan dan responden tidak menuntut relief pemecatan konstruktif dalam tempoh 60 hari di bawah s 20(1A) Akta itu. Dengan yang demikian, soalan mengenai pemecatan konstruktif tidak terbuka untuk dipertimbangkan oleh Mahkamah Perusahaan. Award itu adalah tidak sah dan seharusnya dibatalkan. F G

(2) Mahkamah Perusahaan adalah sesuatu yang diwujudkan oleh statut dan mendapat kuasa dan bidang kuasanya hanya daripada statut yang menubuhkannya, dan terma rujukannya secara eksklusif daripada rujukan yang dibuat kepadanya oleh Menteri. Walaupun s 30(5) Akta itu menyuruh Mahkamah Perusahaan bertindak mengikut ekuiti dan perasaan hati yang baik tanpa mengira keteknikan dan bentuk undang-undang, seksyen itu mesti ditafsirkan untuk membawa makna bahawa Mahkamah Perusahaan boleh mempertimbangkan perkara yang timbul daripada perkara yang dirujuk kepadanya asalkan ia menghadkan dirinya kepada perkara di dalam lingkungan relief spesifik yang dituntut itu sahaja. H I

(3) Walaupun responden mungkin mempunyai sebab yang sah dan berjustifikasi untuk mengadu tentang pemecatan konstruktifnya,

seseorang pekerja yang meninggalkan kerjanya akan dianggap sebagai telah meletak jawatannya. Tiada pemecatan mengikut maksud perundangan pekerjaan kecuali jika terdapat kemungkiran kontrak yang cukup penting oleh majikan dan tindakan pekerja itu adalah suatu gerak balas langsung dan segera terhadap kemungkiran kontrak oleh majikan itu untuk membalas isu penepian atau variasi kontrak perkhidmatan.

(4) Tindakan responden yang tidak menghadirkan diri itu dengan sendirinya merupakan suatu salah laku yang sama seperti suatu penolakan kontrak pekerjaannya dan melalui kegagalannya untuk melaporkan diri untuk bertugas, beliau telah memecatkan dirinya sendiri. Pemohon telah bertindak dengan munasabah apabila ia menerima penolakan tersebut dan tidak memecat responden. Oleh itu, soalan mengenai pemecatan tanpa sebab atau alasan yang adil tidak timbul.

(5) Kegagalan pemohon untuk menjalankan suatu penyiasatan kedua tentang kelakuan responden yang tidak melaporkan diri untuk bertugas pada jawatan yang diturunkan pangkat itu tidak menjejaskan kerana salah lakunya jelas dan forum yang betul untuk menimbulkan isu penurunan pangkatnya itu adalah kepada Ketua Pengarah mengikut s 20(1) Akta itu.

Obiter:

Perkataan 'pekerjaan dahulu' di dalam s 20(1) Akta itu bermaksud jawatan terdahulu seorang pekerja sebaik sahaja sebelum pemecatannya.]

[*Editorial Note*: The respondent has appealed to the Court of Appeal vide Civil Appeal No P–02–110–94.]

Notes

For cases on absence from work, see 8 *Mallal's Digest* (4th Ed) para 467; [1991] Mallal's Digest 1272.

For cases on the jurisdiction of the Industrial Court, see 8 *Mallal's Digest* (4th Ed) paras 714–730; [1991] Mallal's Digest 1284–1286; [1992] Mallal's Digest 1162–1165; [1993] Mallal's Digest 932–933.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 163 (folld)

Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor [1988] 1 MLJ 111 (folld)

Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18 (folld)

Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1984] 1 MLJ 363 (folld)

Hotel Perdana Sdn Bhd (Kota Bharu) v Ruth Fam nee Chan Siew Peng (Kota Bharu) [1992] 1 ILR 172 (folld)
London Transport Executive v Clarke [1981] ICR 355 (folld)
Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor [1994] 2 MLJ 167 (folld)
National Union of Hotel, Bar and Restaurant Workers v Rasa Sayang Beach Hotels (Pg) Bhd & Anor [1988] 2 MLJ 367 (folld)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 20(1), (1A), (3), 30(5)

M Nagarajah (*YK Leong* with him) (*Riza Leong & Partners*) for the applicant.

N Shanmugam (*Shan & Gooi*) for the respondent.

Vincent Ng J: The relief sought by the applicant company was for an order of certiorari to quash the Industrial Court's award under Order No 76/93 handed down on 8 March 1993 ('the said award') on the following grounds:

(a) The Industrial Court erred in law and jurisdiction in finding that the dismissal of the claimant was without just cause or excuse.

(b) The Industrial Court erred and committed a jurisdictional error by considering matters which were not referred to the Director-General nor referred by the honourable Minister to the Industrial Court.

(c) The Industrial Court erred in law and jurisdiction by misdirecting itself and making a decision over matters which the court has no authority to do so.

(d) The Industrial Court erred in law and jurisdiction by considering matters which the claimant had failed and/or chose not to refer to the Director-General within 60 days.

(e) The Industrial Court failed to evaluate the evidence before it and misdirected itself in law in the proceedings by failing to confine its decision to matters arising from the letter dated 6 June 1989, which was the very issue referred to the Director-General and by the honourable Minister to the Industrial Court.

(f) The Industrial Court erred in law and jurisdiction by failing to consider the absence of the claimant from duty from 3 May 1989 continuing to 6 June 1989, whereby the claimant had dismissed himself from work.

(g) The Industrial Court erred in law and jurisdiction by failing to consider that the claimant had repudiated his contract of employment.

(h) The Industrial Court erred in law and jurisdiction when it held that the company had dismissed the claimant but in actual fact the company merely accepted the claimant's wrongful repudiation of his contract of employment which was confirmed in their letter dated 6 June 1989.

The respondent was employed as an assistant general manager by the applicant company on 9 May 1983 and subsequently promoted to the position of general manager on 10 May 1984. By a letter dated 14 January 1989, the applicant company issued a suspension letter to the respondent pending an investigation into an allegation of mismanagement by the respondent of the applicant company's affairs as its general manager.

By a letter dated 28 January 1989, the applicant company gave the following notice to the respondent:

> Mr Ang Beng Teik
> 2 Jalan Kemuning
> Off Jalan Raja Uda
> Butterworth
>
> Dear Mr Ang
>
> Re: Inquiry into the conduct of the affairs of Pan Global Textile Bhd by you as general manager
>
> We refer to our letter dated 14 January 1989 regarding the above matter.
>
> Kindly note that the preliminary investigation conducted by the company reveals gross misconduct on your part in the management of the company.
>
> In view of the above, the company has decided to conduct a domestic inquiry (on the allegations attached herewith) to ascertain its validity and to take the necessary actions in the event the allegations are found to be true.
>
> You are hereby informed that the inquiry will take place on 20 February 1989 at 10am at the Penthouse, Wisma Pan Global, 110 Jalan Pudu, 55100 Kuala Lumpur. Your presence at the inquiry is vital and you are to bring along any witnesses who, in your view, will assist to prove your case.
>
> At the inquiry, you will be given full opportunity to conduct your defence by examining your witnesses and cross-examining the company's witnesses. In this connection, you will be required to furnish the name(s) of your witnesses to the company at least one (1) week before the date of the inquiry. You may also bring along with you any other evidence that may help you in your defence.
>
> Take notice that in event you fail to be present at this inquiry at the time, date and place indicated above, the inquiry shall be held in your absence.
>
> Meanwhile your suspension from work with full pay will continue until further notice from the company.
>
> Yours faithfully
> Pan Global Textile Bhd
> —Sgd—
> Dato' Mak Kok
> Managing Director

Acting pursuant to the outcome of the domestic inquiry and findings of the inquiry panel, the applicant company informed the respondent by a lengthy letter dated 2 May 1989 (exh R3, encl 13) that the allegations against him were proven to their satisfaction at the inquiry held and he was to be demoted to the position of manager (general affairs) and to report for duty on 3 May 1989. A

Despite two letters sent by the applicant company to the respondent dated 12 and 24 May 1989, requiring the latter to report for duty on the demoted position of general affairs manager in the company, the respondent refused to do so but instead wrote a reply to the first letter dated 17 May 1989. The second letter stated as follows: B

> Mr Ang Beng Teik 24 May 1989
> 2 Jalan Kemuning
> Off Jalan Raja Uda
> 12300 Butterworth C
>
> Dear Mr Ang
>
> Re: Downgrading
>
> We refer to your letter dated 17 May 1989 regarding the above matter.
>
> 2 Please note that the company takes a serious view of the allegations contained in the second and third paragraphs of your aforesaid letter and hereby expressly reserves all rights accrued to the company by reason of your said allegations. D
>
> 3 In respect of the fourth paragraph of your said letter, kindly confirm in writing within seven (7) days from the date hereof whether you will abide by the company's decision arising from the domestic inquiry held recently, failing which the company shall have no alternative but to deem that you are no longer interested in the employment with the company. The documents requested will be tendered at the proper time and at the right forum, if required. E
>
> 4 We wish to reiterate that the said letter of 2 May 1989 was personally handed to you by our Mr Wong Swee Min on the said date. However, without prejudice to the same, we enclose herewith a copy of the said letter. F
>
> 5 Kindly note the urgency of the reply to para 3 above and reply accordingly.
>
> Yours faithfully
> Pan Global Textile Bhd
> —Sgd—
> Dato' Mak Kok G
> Managing Director

By reason of the respondent's failure to report for duty, the applicant company issued a letter of termination dated 6 June 1989 which reads: H

> Mr Ang Beng Teik
> 2 Jalan Kemuning
> Off Jalan Raja Uda
> 12300 Butterworth By hand and AR registered
>
> Dear Sir I
>
> Re: Downgrading
>
> We refer to your letter dated 22 May 1989 and all other correspondence pertaining to this matter.

It is evident from these letters that you are no longer interested to be employed in our company. By reason thereof, the company has no alternative but to inform you that your employment with the company is hereby terminated with immediate effect.

Kindly deliver to the company all the company's documents, effects and all other items belonging to the company within 48 hours from the date hereof, failing which we shall proceed to take the necessary action.

As required under the provisions of the Income Tax Act 1967, your salary for the month of May 1989 and from 1 June 1989 to 6 June 1989 will be withheld by us pending clearance from the Inland Revenue Department. We enclose herewith a copy of Form CP22A for your information and attention.

Yours faithfully
Pan Global Textile Bhd
—Sgd—
Senior General Manager

It is of crucial importance to note here that from 3 May 1989 until the date of the termination letter of 6 June 1989, ie for a period of 35 days, the respondent was absent from work. Then, 44 days after receipt of the termination letter, the respondent made representations (vide his letter dated 20 July 1989) to the Director-General of Industrial Relations complaining of the termination of his services with the applicant company. His complaint was specifically worded and the termination letter of 6 June 1989 was pointedly referred to. And, the honourable Minister, by a statutory reference dated 2 November 1980, referred the matter to the Industrial Court under s 20(3) of the Industrial Relations Act 1967 ('the Act') for adjudication on 'The matter of the dismissal of Encik Ang Beng Teik'. The letter reads as follows:

Bil(2) dlm KSM14/13/2 SJ (24 57)

2 November 1990

Yang DiPertua
Mahkamah Persekutuan
50544 Kuala Lumpur

Tuan

Rujukan ke Mahkamah Persekutuan oleh YB Menteri Sumber Manusia mengenai pembuangan kerja Encik Ang Beng Teik oleh Pan Global Textile Bhd, 4828 Mak Mandin Industrial Estate, 13400 Butterworth, Seberang Perai, Pulau Pinang pada 6 Jun 1989.

YB Menteri Sumber Manusia telah memutuskan perkara *pembuangan kerja* Encik Ang Beng Teik dirujukkan ke Mahkamah Persekutuan di bawah s 20(3) Akta Perhubungan Perusahaan 1967, untuk satu keputusan. (Emphasis added.)

2 Tarikh surat rayuan diterima oleh Jabatan Perhubungan Perusahaan ialah pada 20 Julai 1989.

Sekian.

'Berkhidmat untuk negara'

—Sgd—
(Abdul Kahar bin Abu Bakar)
bp Ketua Setiausaha
Kementerian Sumber Manusia A

sk Ketua Pengarah
Perhubungan Perusahaan
50536 Kuala Lumpur. B

Pendaftar
Mahkamah Perusahaan
50544 Kuala Lumpur.

Pengarah
Jabatan Perhubungan Perusahaan C
Bangunan Tuanku Syed Putra
Downing Street
10300 Pulau Pinang.

Pengurus
Pan Global Textile Bhd
4828 Mak Mandin Industrial Estate D
13400 Butterworth, Seberang Perai
Pulau Pinang.

Encik Ang Beng Teik
No 2, Jalan Kamuning
Off Jalan Raja Uda
12300 Butterworth E
Seberang Perai.

The applicant company's challenge of the Industrial Court award could be summarized and is principally confined to three grounds, namely:

(1) The Industrial Court had erred in law and had acted beyond the ambit of its jurisdiction by considering matters which were not referred to it and which the respondent had failed and/or chosen not to refer to the Director-General within the 60-day period as required under s 20(1A) of the Act. F

(2) The Industrial Court had erred and committed a jurisdictional error by holding that the applicant company had dismissed the respondent and failing to consider clear evidence that it was the respondent who had wrongfully repudiated his contract of employment with the applicant company. G

(3) If the contents of the letter dated 6 June 1989 constituted dismissal or termination of the respondent's services with the applicant company, yet such dismissal or termination, even without enquiry or proceedings to terminate (summary termination), does not constitute dismissal or termination without just cause or excuse under the law in view of his continued refusal to report for duty on the demoted position. H I

Taking the first ground first, s 20(1A) is a mandatory and not directory provision, which states in no uncertain terms that:

A

> The Director-General shall not entertain any representations under subsection (1) unless such representations are filed within 60 days of the dismissal.

It is this court's view that the legislature had, in the interests of employees, intended the expression 'dismissal' used in s 20(1A) of the Act, to also B include 'constructive dismissal'. Clearly, a complaint of constructive dismissal is an available relief under the Act, as it is inconceivable that the legislature could have intended to permit a situation whereby, eg a company/employer who intends to get rid of its manager demotes him to a position of a clerk and then claims that the employee is not dismissed but rather still employed with the company as probably the highest paid clerk in the C country.

It was the applicant company's contention that the Industrial Court had considered the question of constructive dismissal of the respondent when it was not seized with this issue in its terms of reference. In order for the court to consider what was considered and thus, what was the focal D point of the Industrial Court's decision, it would be relevant to reproduce the part of the chairman's speech in the said award, which reads:

> Is the above evidence sufficient to justify the dismissal of the claimant? Certainly not. The company has not called, eg Dato' Mak Kok, the managing director of the company, to justify the downgrading of the claimant which E the claimant had claimed that there was absolutely no justification on the company's part to demote him. The claimant had claimed there was no proof at all of any guilt on his part. The claimant had also challenged the company on the very composition of the panel of inquiry which had found him guilty of charges levelled against him which resulted in his downgrading. In the circumstances, it is very relevant on the part of the company to call F the chairman of the panel of inquiry and produce the notes taken at the inquiry and the findings of the panel, *to convince this court* that the claimant was properly downgraded and, therefore, he has no justification in refusing to comply.
>
> Moreover, on the evidence I have before me and on the balance of probabilities, *I find that there was victimization* in this case and it appears that G the company was all out to get rid of the claimant.
>
> As such, I find that the dismissal was without just cause or excuse. (Emphasis added.)

From the above excerpt, I have no doubt that the Industrial Court had considered the issue of constructive dismissal which the chairman termed H as 'downgrading'. He even went so far as to say that the respondent was victimized in the downgrading exercise.

The respondent had, in his complaint letter dated 20 July 1989, requested for 'my reinstatement as general manager of Pan Global Textile Bhd'. His counsel, Mr Shanmugam, had also stated that the real issue was I reinstatement and the worker had been consistently asking for reinstatement to his former position as general manager. Indeed, before the hearing commenced in the Industrial Court, the respondent had submitted an amended statement of case to bring in the plea of constructive dismissal. Though the Industrial Court had held that 'the claimant's claim of constructive dismissal was totally erroneous and, therefore, the question of jurisdiction did not arise', yet in the same award it was found that the respondent 'was merely complaining about his demotion and wanted his job back'. This, when considered in conjunction with the contents of the respondent's aforesaid complaint letter to the Director-General of Pan Global Textile Bhd, would show that his real complaint was against his constructive dismissal.

The trade dispute that was referred to it was dismissal and not constructive dismissal. This is clear from the award itself which states as follows:

> Thus, it is clear that what has been referred to this court by the Minister for an award is in respect of the alleged dismissal which occurred on 6 June 1989 as a result of R5 quoted above and not any other dismissal.

An employee's relief against constructive dismissal and dismissal are entirely distinct and separate reliefs, both being available to the employee under the Act. As such, it is not open to the Industrial Court to deliberate on the question of constructive dismissal when the issue referred to it was dismissal vide the letter dated 2 November 1990.

Furthermore, though the Industrial Court had made a finding that there was no constructive dismissal, yet the record shows that it had considered and made a finding that 'the company had not called, eg Dato' Mah Kok, the managing director of the company, to justify the downgrading of the claimant ... to call the chairman of the panel of the inquiry and produce the notes taken at the inquiry and the finding of the panel to *convince this court that the claimant was properly downgraded* ...' (emphasis added).

It cannot be disputed that as soon as the respondent was notified of his demoted position, the relief of constructive dismissal was available to him under the Act, and he did not avail himself by seeking that relief within the 60-day period in which to make the representation under s 20(1A) of the Act. See the cases of *Hotel Perdana Sdn Bhd (Kota Bharu) v Ruth Fam nee Chan Siew Peng (Kota Bharu)* [1992] 1 ILR 172 and *National Union of Hotel, Bar and Restaurant Workers v Rasa Sayang Beach Hotels (Pg) Bhd & Anor* [1988] 2 MLJ 367. In this regard, it was also submitted by Mr Shanmugam that the calculation of the 60-day period should run from the letter dated 24 May 1989 and not from the letter dated 12 May 1989 which, if so, would bring the respondent's representation to the Director-General within the 60-day period. I disagree, as it stands to reason that a representation, being in essence a serious industrial complaint, ought rightly to be made as soon as an employee first has official notice of the employer's act which is the essence of his complaint and which he seeks to impugn. In the current case, this would be when the respondent received the letter dated 2 May 1989 from the applicant company requesting him to report for duty on the demoted position of manager (general affairs) on 3 May 1989, and at the very latest it should be when the reminder dated 12 May 1989 was written to him. On the facts and the admitted chronology of events, I hold that the respondent was

A clearly out of time under s 20(1A) of the Act to make his claim for constructive dismissal; and it was not before the Industrial Court to make any finding on the matter and neither was it referred to it by the Minister.

I shall now turn to the perennial issue of the application of s 30(5) in a reference under s 20(3) of the Act. Unlike the High Court, an Industrial B Court is a creature of statute; it derives it powers and jurisdiction solely from its founding statute, and its terms of reference on which it is to function, solely and exclusively from the reference made to it by the Minister. As a court of reference and to avoid falling into jurisdictional error, it should consider only trade disputes referred to it. Though s 30(5) of the Act enjoins the Industrial Court to 'act according to equity, good C conscience and substantial merits of the case without regard to technicalities and legal form', this provision can only be invoked in its adjudication of the trade dispute(s) referred to it. It should not be allowed to cure itself and in effect enlarge its jurisdiction by invoking s 30(5), otherwise it would negate the very central principle that, as a court of reference, its jurisdiction D is governed and materially circumscribed by statute, as amply postulated by a welter of case authorities.

The question of great interest which the court may have to ask itself is, how do we reconcile the principle enunciated in *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 — which states that the prerequisite to the Industrial Court's assumption of jurisdiction is a reference E by the Minister — and the ratio in *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1984] 1 MLJ 363 — wherein it was held that if the Industrial Court asks itself a wrong question or takes into account matters which it was not directed to take into account, it would be stepping outside its jurisdiction and would cause its decision to F be a nullity — on the one hand, with the provisions of s 30(5) of the Act on the other hand? In my view, the effect of this provision would not be in conflict with the ratio in *Enesty* and *Hotel Equatorial* if s 30(5) is interpreted, and I do here interpret it, to mean that the Industrial Court may deal with matters *arising out of* matters referred to in considering the substantial merits of the case so long as it restricts itself only to matters within the G ambit of the specific relief claimed in the industrial dispute referred to it by the Minister. See my decision in *Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor* [1994] 2 MLJ 167.

The current case could serve as a good illustration of this interpretation of s 30(5). As the reliefs sought by a worker for constructive dismissal and H dismissal are distinct and separate reliefs in an industrial dispute, they individually require specific reference by the Minister. The complaint of constructive dismissal was not before the Industrial Court as it neither could have been nor was in fact referred by the Minister. By not only taking into consideration but, a fortiori, also making a finding and having I adjudicated on the issue of constructive dismissal (couched as downgrading/ demotion) of the respondent, bereft of any reference to it on this specific relief in the industrial dispute by the Minister, and indeed, by also being clearly influenced by that consideration into making its decision on the industrial dispute of dismissal (that was in fact referred), the said award has been rendered a nullity and should be quashed. (See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 163.) Thus, pithily expressed, the Industrial Court was under a duty to confine its enquiry to the basis of termination vide the letter dated 6 June 1989 but, by venturing beyond these confines, it has acted without jurisdiction and has committed errors in jurisdiction which warrants the award to be quashed; a decision not according to law is no decision at all.

I shall next turn to the second issue of alleged termination or dismissal of the respondent's services by the said letter dated 6 June 1989, this being the specific dispute referred by the Minister to the Industrial Court. The question to ask here is: was there a dismissal? This was a hotly contested issue which was submitted by the applicant company in the alternative.

The Industrial Court in its award stated as follows:

> As stated in CLI at pp 35 and 38, the reason for terminating the claimant's services was because the claimant was no longer interested to be employed in the company as he had failed to abide by the company's decision arising from the domestic inquiry. Clearly, the claimant had not abandoned his services but they were summarily terminated for the misconduct of failing to report for duty to a demoted position as decided by the company.
>
> The company did not conduct any disciplinary proceedings with regard to the alleged misconduct. The claimant was not asked to explain as to why he had failed to report for duty in compliance with the decision of the company. He was not given the right to be heard. The company had failed to make an inquiry before terminating the services of the claimant.

The Industrial Court had made a finding of fact that, due to the downgrading of the respondent to that of a manager (general affairs) with effect from 3 May 1989, the claimant had protested and refused to report for work. At any rate, it is clear from the record and submissions of both counsel during the hearing, that this was not the case where the respondent was sick at the material period, or was unable to report for duty due to circumstances beyond his control, or that he had not received any of the several aforesaid letters from the applicant company notifying him of his demotion and requiring him to report for duty. In the circumstances, though the respondent may have had valid and justifiable grounds to complain about his constructive dismissal, and perhaps, if he had complained within time and this had been specifically referred to the Industrial Court by the Minister, he may have succeeded, yet since this was not the case, was the Industrial Court justified when applying the facts of the case, in holding:

(i) that the respondent was in fact and in law dismissed and his services terminated summarily; and

(ii) the company was required to make an inquiry before terminating the services of the respondent?

In short, had the Industrial Court not only misconstrued the law but had it also done or failed to do something in the course of its hearing which is

A of such a nature that its decision is a nullity? It is settled law that unless there is a sufficiently important breach of contract by the employer and the employee's action is in direct and prompt response to the employer's breach (to counter the point of waiver of breach or variation of contract of service), an employee who leaves his work will be held to have resigned B and there will be no dismissal within the meaning of the employment legislation at all.

In this regard, I am also fortified by the words in the speech of Lord Denning MR who said in the case of *London Transport Executive v Clarke* [1981] ICR 355 as follows:

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> ... I would ask this question: can an employee take off — go absent without leave for six months and on returning say to his employer, 'You have not dismissed me. I want my job back'. If the employer refuses to take him back, can the man say, 'By your refusal you have dismissed me. Now I claim for unfair dismissal'. Surely in such a case, by taking off for six months without leave, *the man has dismissed himself.* If this be correct when he takes off for D six months, it should also be for two months, or as here for seven weeks. The reason is because it is completely inconsistent with the continuance of his contract that he should take so long a time off. In some cases the employer will have replaced him by some other man or have got his work done by others. In other cases, he may have left his work undone. But whatever it is, the employer cannot reasonably be expected to take him E back. *The man will himself have terminated his contract of employment.* (Emphasis added.)

The duties of the Industrial Court in a reference under s 20 of the Act, on unjustified dismissal, has been aptly stated in the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, thus:

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> When the Industrial Court is dealing with a reference under s 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.

Similarly here, as in *Wong Chee Hong*, the Industrial Court is charged with G the duty of first considering whether the employee was dismissed. Only having decided that there was dismissal in the true meaning of the word, could the Industrial Court consider if the dismissal by the employer was without just cause or excuse.

The jurisdiction of the Industrial Court to intervene in matters of H dismissal begins with the statutory representation by the claimant under s 20(1) of the Act followed by the statutory reference of this specific industrial dispute by the Minister to the Industrial Court. This provision reads:

> When a workman, irrespective of whether he is a member of a trade union I of workmen or otherwise, considers that he has been dismissed *without just cause or excuse by his employer*, he may make representations in writing to the Director General to be reinstated in his former employment ... (emphasis added).

In this context, 'former employment' obviously means his former position A immediately prior to his dismissal.

In the matter before me, after the respondent was found guilty of several charges against him, and the board of inquiry's recommendation that he be demoted to the position of manager (general affairs) was implemented vide the letter dated 2 May 1989 to him, the respondent had B the option at that point in time of his receipt of the letter dated 2 May 1989, to refer the matter to the Director-General, since he was unhappy about the composition of the panel of inquiry resulting in his demotion. Instead, he stayed away from work. The act of being absent is itself a misconduct on the part of the respondent. The post-demotion conduct of the applicant as aforesaid makes it unrealistic and unjust for the court to C conclude that the applicant company had repudiated the contract of employment or alternatively had terminated the contract of employment. Indeed, it is the act of the respondent by staying away from work, which evinces an intention of not wanting to continue his employment with the applicant thereby repudiating the contract of employment. This being so, D the letter of the applicant dated 6 June 1989 ought to be taken as an acceptance of the repudiation and/or a termination of the contract of employment, when considered in the light of the *London Transport Executive* case. It can be similarly held in this case, having regard to equity and the events of the case, that the applicant company had acted reasonably in treating the repudiatory conduct of the respondent as sufficient reason for E accepting the repudiation and thus determining the contract. The respondent absenting himself from work without consent for what he considered was a good reason, is no basis to hold that the respondent did not repudiate his contract of employment. It is crystal clear that the respondent here took no action concerning his unhappiness with the F applicant company's earlier decision on his demotion until 44 days after the applicant company had accepted his repudiatory conduct and the contract of employment was terminated. The aforesaid conduct of the respondent implies that his subsequent action was an afterthought. Perhaps it was because the time limit stipulated in s 20(1A) had already expired at the material time, that the respondent did not make a formal complaint on G the constructive dismissal and/or demotion to the Director-General pursuant to s 20(1) of the Act.

Is it in the interests of sound commercial climate or good industrial relations to condone the action of an employee who stays away from work when he is demoted and claims to remain an employee until the company H agrees to his request for reinstatement to his former position and benefits? Can we take away an employer's right, if justifiably exercised, to demote an employee? Taking an extreme example, if the employee chooses to stay away from work, without lodging any statutory complaint, for two years after demotion while requesting for reinstatement, what could the employer do to avoid the complaint of having dismissed or constructively dismissed I the employee? It cannot be correct either in law or in equity to oblige the employer either to wait indefinitely for the employee's return or to cave in to his demands. Therefore, the question posed here as to whether the respondent was dismissed — as posed in *Wong Chee Keong* — should be answered in the negative. Thus, I held that the applicant company did not dismiss the respondent, who by his failure to report to work had dismissed himself, and the question of whether 'dismissal was without just cause or excuse by his employer' did not arise.

The third and last issue is, if there was, in fact and in law, a termination of the respondent's services vide the letter dated 6 June 1989, then was the summary termination of the respondent's services in the circumstances of the case tantamount to a dismissal without just cause and excuse? In the case of *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111, it was held that the workman who was dismissed for misconduct was lawfully dismissed although no inquiry had been held. The acid test to apply is as expressed in *Dreamland Corp* thus:

> Where an employer has not followed a proper procedure, the right approach is for the Industrial Tribunal to ask two questions. First, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the same information which that inquiry would have produced? Secondly, have the employers shown that in the light of the information which they have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss.

Upon the facts, the answers to the two questions above, in this matter would also be in the affirmative. The fact that the applicant company did not conduct an inquiry on the conduct of the respondent in not reporting for work is not fatal; there would be no additional information which would be gathered from the inquiry and the decision would have been the same, as the misconduct of the respondent is clear and not unambiguous. Furthermore, had an enquiry been held, the respondent would have raised the issue of demotion, and this would not be the proper forum for the respondent to do so, considering that the proper forum under the law to raise such issue and to lodge his complaint, would be to the Director-General pursuant to s 20(1) of the Act. The respondent had adopted an attitude of indifference. Would not the action of the employer in such circumstances be justified? Yes it would, as otherwise all employees will stay away from work to win their demand whether valid or invalid, and yet tie the hands of the employer from taking any action without being accused of having dismissed the employee from his employment.

Upon the above rationale, I further held that in the circumstances of this case, there was no necessity for the applicant company to carry out any disciplinary proceedings or enquiry before taking the action they did when the respondent refused to report for duty on the demoted position of general affairs manager.

In the event, I held that the Industrial Court had grievously erred in law and in jurisdiction for having:

(i) adjudicated on the question of constructive dismissal of the respondent when this question was not referred to it;

(ii) held that there was a dismissal of the respondent's services with the applicant company when there was in fact and in law no dismissal;

(iii) held that the alleged dismissal was without just cause or excuse because no disciplinary proceedings or enquiry were carried out by the applicant company before terminating the services, when the conduct of the respondent after his demotion did not warrant such proceedings or enquiry.

And I, therefore, gave an order in terms of prayers (i) and (ii) of encl 15, quashed Award No 76 of 1993 and awarded costs of these proceedings to the applicant company.

Application allowed.

Reported by Anne Khoo